

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF AGRICULTURE

In the Matter of the Claims Against
Grain Buyers' Bond No. BND 136 60 38,
Felton Farmers' Cooperative Elevator,
Principal, Continental Guaranty and
Credit Corporation, Surety

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on May 22, 1992, at the Office of Administrative Hearings. Paul Kuball, Route 1, Box 68, Borup, Minnesota 56519, appeared on behalf of Cavalier Life Trust and its managing trustee Herbert Kuball, both of the name address. David W. Rosscup, General Manager, Felton Farmers Co-op. Elevator Co., Felton, Minnesota 56536, appeared on behalf of Felton Elevator. Paul A. Strandberg, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, appeared on behalf of the Department of Agriculture. The record closed upon adjournment of the hearing that day.

This Report is a recommendation, not a final decision. The Commissioner of Agriculture will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Elton R. Redalen, Commissioner, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Felton Elevator was obligated to make unconditional payment for soybeans delivered to the elevator by Cavalier Life Trust when Felton Elevator had no notice of any liens against the trust, but had some doubt about title

to the beans based upon news reports.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Felton Farmers' Co-op . Elevator Co. (the Felton Elevator) is licensed as a grain buyer under Minn. Stat. 223.17. Subdivision 4 of that statute requires that grain buyers obtain and file a bond with the Commissioner of Agriculture as a condition of licensure. The Felton Elevator has such a bond, number BND 136 60 38 issued effective July 1, 1990, by the Firemen's Insurance Company of Newark, New Jersey. Ex. F.

2. Cavalier Life Trust is a private family trust originally created by Paul Kuball and his wife as grantors. They were also the co-trustees and beneficiaries of the trust. In 1988, Paul and his wife transferred their interests in the trust to their children. Since then, the children have been the beneficiaries of the trust as well as co-trustees. One son, Herbert Kuball, is the managing trustee.

3. Paul and his wife are also the creators and grantors of another trust known as the Brainerd Management Trust. They remain as the beneficiaries of that trust as well as its co-trustees.

4. Felton, Minnesota, is in northern Clay County. Borup, Minnesota, is about ten mile; north of Felton just into Norman County. The Kuballs live on a farm with a rural Borup address, but which is apparently located in Clay County. The farm is owned by Brainerd Management Trust and leased to Cavalier Life Trust. Cavalier Life Trust operates the farm using equipment owned by it. It is not clear from the record as to who actually works the farm, but it appears to be Herbert and, perhaps, others. According to the Kuballs, crops grown on the land belong to Cavalier Life Trust.

5, On October 4, 1991, just before noon, Herbert arrived at the Felton Elevator with a truckload of soybeans to sell. He was a new customer for the Felton Elevator. Mike Armstrong, an employee of the Felton Elevator, received the beans and gave Herbert a copy of the scale ticket showing a total of 16,080 pounds of beans received. That is equivalent to 268 bushels which, after deduction of 4.4 percent dockage, yielded 256.21 net bushels. Those were shown as sold for \$5.33 per bushel on the scale ticket. Herbert left to get more beans.

6, As soon as Herbert left the elevator, the employees informed David Rosscup, the general manager, that Herbert had dumped a load of beans. The employees were wondering about liens on the beans because they were aware of

news reports that Paul was a tax protester, that the IRS had liens against Paul and that Paul had made some threat against the IRS if they attempted to take possession of his liened property. Rosscup knew that Paul was Herbert's father and heard from his discussions with various people about the reports in the media that Paul might be using trusts registered outside of the United States to avoid or reduce taxes.

7. It is Rosscup's understanding of the law that if a buyer of farm products has notification of a lien on the property of the seller, the buyer risks having to pay the lien holder for the value of the products in addition to paying the seller for them. This is referred to in the trade as being subject to "double jeopardy." The normal method used by the elevators to protect themselves from that risk is to make a check for grain payable to both

the producer and the lien holder,

H. Country elevators and other grain buyers have historically been very cautious about buying and paying for farm products because of the "double jeopardy" problem. Buyers of such products are not covered by the protections given to buyers of non-farm products by the Uniform Commercial Code. In 1985, Congress enacted a law to provide protection for purchasers of farm products. Public Law 99-198, Title XIII, 1324(j), coded 7 USC 1631 and effective December 23, 1986. The need for and purpose of the law is stated at 7 USC 1631(a) and (b) as follows:

(a) Congress finds that --

(1) certain State laws permit a secured lender to enforce liens against a purchaser of farm products even if the purchaser does not know that the sale of the products violates the lender's security interest in the products, lacks any practical method for discovering the existence of the security interest, and has no reasonable means to ensure that the seller uses the sales proceeds to repay the lender;

(2) these laws subject the purchaser of farm products to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender;

(3) the exposure of purchasers of farm products to double payment inhibits free competition in the market for farm products; and

(4) this exposure constitutes a burden on and an obstruction to interstate commerce in farm products.

(b) The purpose of this section is to remove such burden on and obstruction to interstate commerce in farm products.

The law then provides that a buyer who, in the ordinary course of business, buys a farm product from a seller engaged in farming operations, takes the product free of any security interest unless the buyer has notice of the security interest in accordance with other provisions of the law.

9. The Felton Elevator maintains a "lien list" of the liens of which it has been notified. When a farmer appears at the elevator with a load of grain from his farm, it is the normal practice of the Felton Elevator to check its lien list and, if there are no liens against the farmer, accept the grain and make payment to the farmer.

10. The Felton Elevator had not been notified of any liens against

Cavalier Life Trust or any of the Kuballs. However, Rosscup considered this an abnormal situation because of the stories of the IRS liens; therefore, he immediately called the Clay County Recorder and the Clay County Agricultural Stabilization and Conservation Service (ASCS) to see if there were any liens.

Checking with the ASCS for liens is a common practice. Because of the loans and payments the ASCS makes to many farmers under federal programs, most lien holders give them notice of their liens. The ASCS had no liens, but the County Recorder had the IRS as a lien holder on Paul and Grace Kuball. At his regular meetings with other elevator managers, Rosscup had never heard of any elevator in the area having any problems with grain they purchased from Cavalier life trust or the Kuballs.

11. When Herbert arrived with a second load of beans later that afternoon, Rosscup went out to talk to him. He told Herbert that he was aware of the lien on Paul and would have to check further to see if the lien applied to Cavalier Life Trust. Herbert had no problem with that and went to get a third load. When he returned, Herbert told Rosscup that the beans belonged to him and that the lien on his father had nothing to do with him. Rosscup told Herbert that he would still have to check and that if he had any problems with that, he shouldn't dump any more beans and the other beans could be reloaded and returned to him. Herbert replied, "These are my beans," and dumped the beans .

12. The second load of beans weighed 19,440 pounds, which converts to 324.00 bushels. Dockage on that load was 2.9 percent, resulting in 314.60 net bushels. The third load weighed 16,700 pounds, which converts to 278.33 bushels, Dockage on that load was 3.2 percent, resulting in 269.42 net bushels- The second and third load were marked as sold for \$5.37 per bushel. The purchase price for the second and third loads was thus \$3,136.19. The total for all three loads was \$4,501.79. Ex. F.

13. On Monday, October 7, 1991, Herbert went to the Felton Elevator to ask for payment for his beans. Rosscup had not been able to reach the IRS yet and told Herbert that he would give him a check, but until he knew for sure where the IRS stood, he would also put the IRS on the check as a co-payee. That was not acceptable to Herbert, so he left the elevator.

14. Late in the afternoon of October 8, 1991, Rosscup was able to reach an Ilene Bar from the IRS. She told Rosscup that the IRS did have a lien on the beans but, after some checking, told him that they didn't have it in place

at the time, apparently meaning it had not been filed. She told Rosscup to go ahead and pay Herbert, Rosscup told Bar that if the IRS had a lien, he would need that information to put on the check or, if they were going to waive the lien, he wanted some type of release. She told him that she would look into the matter and get back to him.

15. On October 9, 1991, Herbert was busy hauling sugar beets so he sent two friends to get the check or the beans. Again, Rosscup refused to issue a check unless the IRS was listed as co-payee, therefore, an equivalent amount of beans were returned to Herbert's friends.

16. Three truckloads of beans were loaded out to Herbert's friends, who delivered them to the Georgetown Farmers Elevator in Georgetown, Minnesota, for sale. The first truckload, according to the Felton Elevator's scale, was 15,920 pounds or 265.33 bushels. After deduction of dockage, that was computed at 260-02 net bushels. At the Georgetown Elevator, that load was weighed at 15,900 pounds or 265 bushels. Georgetown measured more than twice as much dockage on that load, resulting in 253 net bushels. On the second

truckload, the Felton Elevator measured the net bushels at 300.03 and the Georgetown Elevator measured it at 290. Felton Elevator measured the third load to be 279.30 net bushels and Georgetown Elevator measured it at 267 net bushels.

17. The Georgetown Elevator paid Cavalier Life Trust \$5.23 per bushel for the first load and \$5.20 per bushel for the second and third loads, a total of \$4,219.59,

18. Georgetown is about fifteen miles west of Felton. There is sometimes a difference between the price paid for beans by the Felton Elevator and the Georgetown Elevator, particularly when the Felton Elevator is loading train cars rather than trucks. When that is the case, as it was on October 4, 1991 the Felton Elevator is able to pay a somewhat higher price.

19. When they were loading out the beans for Herbert, Felton Elevator employees were catching samples that appeared to be reading too high on dockage. When Herbert's friends returned for the third load, the dockage was measured the same way but Rosscup also used a probe to take a sample from the loaded truck. When that sample was measured, Rosscup determined that the other samples had been in error and told the men to have Herbert come in so they could agree on a settlement. Herbert did not come in, so on October 15, 1991, Rosscup computed what he thought was an appropriate adjustment and mailed Herbert a check made out to Cavalier Life Trust for that amount, \$65.29. As of the date of the hearing, Herbert had not received that check and it had not been cashed.

20. The Clay County Recorder charged the Felton Elevator \$27.00 for doing tax lien searches against Cavalier Life Trust and Paul Kuball.

21. By letter of October 28, 1991, received by the Commissioner of Agriculture on October 31, 1991, Cavalier Life Trust filed a complaint regarding Felton Elevator's refusal to pay for the three loads of soybeans, alleging that the elevator had discriminated against the trust in violation of Minn. Stat. 232.23, alleging that it suffered financial damages and suggesting that the Felton Elevator license should be suspended pursuant to Minn. Stat. 232.22. Ex, C,

22. By letter of December 17, 1991, the Felton Elevator provided its response to the allegations. Exs. D and F.

23. By letter of February 20, 1992, James H. Gryniewski, Acting Director of the Grain Licensing and Auditing Division of the Department of Agriculture, notified Herbert Kuball that the Department had investigated his claims and had determined that they were not valid and therefore did not intend to take any action against the Felton Elevator's license or make any claim against its bond. Ex. A. By letter of February 28, 1992, received by the Department on March 3, 1992, Cavalier Life Trust properly appealed the Department's determination

24. The difference between the amount that the Felton Elevator would

have paid, \$4,501.79, and the amount paid by Georgetown Elevator for the beans, \$4,219.59, is \$282.20. The trust claimed a slightly lower amount, due to a miscalculation in the price the Felton Elevator would have paid for the

first truckload. In addition to the loss in selling price Cavalier Life Trust claims damages of \$54.00 for trucking the beans thirty-six miles at \$1.50 per mile and \$250.00 for a minimum of ten hours of research and paper work to submit its claim.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Agriculture and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. sec. 223.11, subd. 8, and 14.50.

2. Minn. Stat. 223.17, requires grain buyers to obtain a license from the Department of Agriculture and to file a bond with the Department. The purpose of the bond requirement is to provide protection and security for grain farmers to guarantee that they receive payment for their harvested crop. Minnesota Grain Elevator Legislation: Inadequate Protection For Minnesota's Grain Farmers Means Overprotection for the Country Elevator, 13 Wm. Mitchell [Rev. 221, 232 (1987)].

3. Minn. Stat. sec. 223.17, subd. 5, provides that a grain buyer shall tender payment to the seller in cash or by check by the end of the next business day after the sale of at least 80 percent of the value of the grain and complete final settlement as rapidly as possible through ordinary diligence. Minn. Stat. 223.17, subd. 8, provides in relevant part:

Bond disbursement. (a) The bond required under subdivision 4 shall provide for payment of loss caused by the grain buyer's failure to pay, upon the owner's demand, the purchase price of grain sold to the grain buyer in the manner provided by subdivision 5, including loss caused by failure to pay within the time required. The bond shall be conditioned upon the grain buyer being duly licensed as provided herein.

4. Minn. Stat. Ch. 232 deals with grain storage, Minn. Stat. 232-22, provides for the licensing of public grain warehouses, requires bonds prior to licensure and has provisions for claims against the bond and license suspension and revocation virtually identical to the provisions of Minn. Stat. 223.17. Minn. Stat. 232.23, specifies the duties of a public grain warehouse operator and requires all such operators to receive all sound grain tendered for storage, to the extent of its capacity, "without discrimination against any person tendering the grain." Because this matter involves grain

tendered for sale rather than storage, Minn. Stat. 232.22 and 232.23 do not apply.

5. The Felton Elevator's offer to pay for the grain delivered by Cavalier Life Trust only with a check made payable to the trust and the Internal Revenue Service did not constitute tender of payment as required by Minn. Stat. 223.27, subd. 5, That section requires the grain buyer to tender payment to the seller in cash or by check of at least 80 percent of the value of the grain. A check payable to the seller and another person is not a

check payable to the seller.

6. The Felton's Elevator's refusal to provide payment to Cavalier Life Trust for the beans was justified under the circumstances because Felton Elevator had reasonable doubt as to whether Cavalier Life Trust owned the beans and whether the beans were subject to the IRS lien on Paul Kuball and his wife.

7. Because the Felton Elevator raised reasonable doubts about Cavalier Life Trust's title to the beans, it was Cavalier Life Trust's obligation to prove its ownership of the beans and freedom from any liens or provide alternative means of protecting the Felton Elevator from the risk of unclear title

8. Since Cavalier Life Trust refused to accept a check made payable to itself and the Internal Revenue Service, the Felton Elevator's only obligation was to return beans to the trust equivalent to those that had been delivered for sale. Having done so, its only obligation was to pay for the difference in value caused by the slight difference in the number of bushels as adjusted by the dockage. The payment tendered by the Felton Elevator to Cavalier Life Trust fulfills that obligation. However, because that check has not been cashed since being issued over seven months ago, it is appropriate for the Felton Elevator to stop payment on it and issue a replacement check. Because the Felton Elevator is willing to do that, the Felton Elevator has met all of its obligations to the Cavalier Life Trust and there are no valid claims against the bond.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Agriculture DENY the claims of Cavalier Life Trust against the Grain Buyer's Bond No. BND 136 60 38 of Felton Farmers' Cooperative Elevator Company,

Dated this 5th day of June, 1992.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, not transcribed. Tape No. 12,060.

MEMORANDUM

In its determination of February 20, 1992, and at the hearing, the Department took the position that the Felton Elevator's offer to pay Cavalier Life Trust with a check naming the Internal Revenue Service as a co-payee was an adequate offer of payment. However, Minn. Stat. 223.17, subd. 5, requires that payment be tendered to the seller. As a general rule, tender must be made to the person entitled to receive it or it will be held invalid. It must be made to the creditor or one either actually or apparently authorized to receive tender. 86 CJS, Tender 39. Offering a check made payable to the trust and the Internal Revenue Service does not constitute tender of payment to the trust. Grant v. Cronin, 12 Wis.2d 352, 107 N.W.2d 153 (1961). (Tender of a check payable to the owner of condemned property, his wife and the occupants of the property did not constitute valid tender of a condemnation award required by statute to be paid to the owner of the property even though those other persons had some interest in the proceeds)- Therefore, it was incorrect to conclude that the Felton Elevator made a proper tender of payment.

However, the Felton Elevator was under no obligation to pay Cavalier Life Trust for the beans because it was reasonable for the Felton Elevator to question the trust's ownership of the beans and whether the tax lien against Paul Kuball and his wife attached to the beans. In its determination, the Department stated that because Herbert Kuball had stated that there were no liens on the grain and since the Felton Elevator had received no notice of the liens prior to the grain being presented for sale, Felton Elevator could have issued a check to Cavalier Life Trust without fear of having to make double payment. However, that conclusion presumes that the owner of the beans was indeed Cavalier Life Trust. But Rosscup had some reasonable doubt about that. He knew that there was an IRS tax lien filed against Paul Kuball and his wife. He had heard about news reports that Paul Kuball was involved in a dispute with the IRS and that the matter involved the use of some kind of trusts that may have been registered outside of the United States. He knew that Herbert was Paul's son and that the beans came from the Kuball's farm. However, he had never done business with the Kuballs or their trusts before and he didn't know what the Cavalier Life Trust was, whether it was the owner of the beans or whether the lien on Paul and his wife attached to the beans. He was told by the IRS that there was a lien on the beans but that it had not yet been put in place yet. He was waiting for a release or some other documentation from the IRS when Herbert Kuball sent his friends demanding payment or return of the beans.

When there is a reasonable question of clear title, it is the seller's obligation to prove ownership of the property and that it is free from liens; it is not the buyer's obligation. 77 CJS, Sales, 119. In this case,

Rosscup's doubt as to clear title was reasonable. This was not just a farmer bringing in beans from what is known to be his land. It was a trust unknown to Rosscup, perhaps subject to an IRS action, bringing in beans from what appeared to be Paul Kuball's farm. Cavalier Life Trust offered no documentary proof to the Felton Elevator that it was the owner of the beans and that the beans were free of liens. The only assurance offered by Cavalier Life Trust that it was the owner of the beans free of the lien on Paul Kuball was Herbert's statement to Rosscup that the beans were his and that the lien on

Paul did not apply. At that point in time, Felton Flevator was fully justified in rescinding the agreement to buy the beans. Felton Elevator's offer to pay for the beans with a check also naming the IRS as a co-payee or to return the beans was more than reasonable and all that was required of it.

SMM